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No. 00-151

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

OAKLAND CANNABIS BUYERS' COOPERATIVE AND JEFFREY JONES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

The Ninth Circuit has held that medical necessity is a "legally cognizable defense" to a charge of distributing marijuana, a Schedule I controlled substance, in violation of the Controlled Substance Act (CSA), and that district courts have "equitable discretion" to permit an organization to engage in the ongoing distribution of marijuana, wholly outside the Act's strict controls, to individuals claiming a medical need for the drug. Pet App. 8a, 10a. Those unprecedented holdings are fundamentally wrong and warrant review.

1. a. As we demonstrate in our certiorari petition (at 18-20), the court of appeals' decision warrants this Court's review because it significantly undermines the effectiveness of the CSA and threatens the government's ability to enforce an Act of Congress that is central to combating illicit drug trafficking. By listing marijuana as a Schedule I controlled substance, Congress has categorically banned the distribution of marijuana for any purpose, including purported medical use, "[e]xcept as authorized" by the Act itself, 21 U.S.C. 841(a)(1)—*i.e.*, unless the distributor is registered with the DEA and is conducting research approved by the FDA. 21 U.S.C. 823(f); 21 C.F.R. 5.10(a)(9), 1301.18, 1301.32; 28 C.F.R. 0.100.(b). That categorical ban may be modified only if the Attorney General, after following the exclusive procedures set forth in the CSA, transfers marijuana from Schedule I to another schedule, or removes marijuana altogether from the CSA. See 21 U.S.C. 811, 812, 829.

The Ninth Circuit's decision flouts those provisions, and goes even further by permitting the open and notorious distribution of marijuana wholly outside the Act's stringent controls, which mandate that *any* person who dispenses *any* controlled substance—even substances listed in Schedules II through V—must register with the DEA, establish security controls, and comply with record-keeping, reporting, order-form, and prescription requirements. See 21 U.S.C. 821-829.

And, finally, the Ninth Circuit's decision places no limitation whatsoever on the quantity of marijuana that respondent or others similarly situated may distribute, either in the aggregate or to particular customers, or the number of people to whom respondents and others may distribute marijuana under the guise of "medical necessity." The decision thus has enormous legal and practical importance.

b. In opposing certiorari, respondents argue (Br. in Opp. 8-13) that the legal issues involved will not be ripe for this Court's review until the Ninth Circuit has disposed of the government's appeal of the district court's July 17, 2000, orders on remand, which modified the district court's May 19, 1998, injunction to permit respondents to distribute marijuana to persons claiming a medical necessity for the drug. Pet. App. 12a-17a.[1] As we explain in the certiorari petition (at 22-23), however, no further factual development or proceedings are needed for this Court to render a definitive resolution of the case. Our petition presents the purely legal question whether the CSA forecloses a medical necessity defense to a violation of the Act. Pet. i. Contrary to petitioner's contention (Br. in Opp. 12), the Ninth Circuit did not address that issue "only indirectly and tangentially." Rather, it held that (1) medical necessity is a "legally cognizable defense" under the Act, Pet. App. 8a, and that (2) a supposed "public interest" in the availability of marijuana for asserted medical uses outweighs the government's "general interest in enforcing" the CSA, *id.* at 9a, 11a. There is no reason to believe that the same Ninth Circuit panel, which has retained jurisdiction over any appeal, *id.* at 11a, will

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[1] Although respondents have requested that the Ninth Circuit expedite its resolution of the government's appeal (Br. in Opp. 2), the court has neither acted on that request nor indicated when it will issue its decision.

revisit those conclusions.[2] Indeed, that court has already determined that "[t]he evidence in the record [on the first appeal] is sufficient to justify the requested modification," and that it had "no doubt" the district court could have modified the injunction on the basis of that evidence had it chosen to do so. *Id.* at 10a.

Contrary to respondents' contention (Br. in Opp. 8), there is no reason to postpone review to allow the Ninth Circuit to consider "new evidence" that patients have a medical need for marijuana or that the City of Oakland has declared that there is a "medical emergency" for marijuana. Those assertions were before the court of appeals when it rendered the decision we seek to have reviewed. Pet. App. 10a. In addition, those assertions ignore the statutory framework of the CSA, which assigns to the Secretary of Health and Human Services and the Attorney General the responsibility to review any evidence concerning the possible efficacy and potential for abuse of controlled substances in order to determine, on a uniform nationwide basis, whether they may be distributed for medical purposes (if approved by the

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[2] Respondents err in asserting (Br. in Opp. 11) that the Ninth Circuit's holding could be supported on the alternative grounds that marijuana distribution is required by substantive due process and Ninth and Tenth Amendment principles. No court has adopted any of those highly dubious contentions, and unless and until a court does so, the decision below has the precedential effect of authorizing marijuana distribution in flagrant violation of the CSA. There is also no merit to respondents' attempt (*id.* at 10) to bring themselves within the immunity for state or local "officers" of a subdivision of a State "who shall be lawfully engaged in the enforcement of any law or municipal ordinance relating to controlled substances." 21 U.S.C. 885(d). Even if we assume, *arguendo*, that a private organization would qualify as a public "officer," the immunity in Section 885(d), which is designed to permit undercover activities and similar measures to enforce *prohibitions* against the distribution of controlled substances, obviously does not apply to an entity that is engaged in the open and notorious distribution of marijuana with no purpose of enforcing any such prohibitions.

FDA under the Federal Food, Drug, and Cosmetic Act (FDCA), 21 U.S.C. 301 *et seq.*, for those purposes). The CSA does not delegate that responsibility to individual district courts, municipal governments, and private distributors of controlled substances throughout the country.

For the foregoing reasons, there is simply nothing to be gained by postponing review of the court of appeals' decision until that court rules on the government's appeal. To the contrary, postponing review would only exacerbate the adverse consequences of the decision by encouraging broad disregard of the CSA and the unregulated distribution of marijuana, with the attendant serious potential for abuse that Congress sought to prevent by placing marijuana in Schedule I under the Act.[3]

Respondents argue (Br. in Opp. 10) that the government would "suffer[] no inconvenience" from a denial of certiorari because this Court, on August 29, 2000, granted our application for a stay of the district court's July 17, 2000, orders on remand. The July 17 orders, however, apply only to *respondents'* distribution of marijuana. The Ninth Circuit's decision recognizing a medical necessity defense has precedential effect throughout the Ninth Circuit, which has a population of more than 50 million people.

Five States in the Ninth Circuit (Alaska, California, Hawaii, Oregon, and Washington) have passed legislation sanctioning the use of marijuana for medicinal purposes. Pet. 20-21. Within those five States, there already are more

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[3] Respondents contend (Br. in Opp. 7) that the government "remains free * * * to prosecute anyone that it believes to be violating the federal drug laws." But respondents do not dispute that the court of appeals held that "medical necessity" is a "legally cognizable defense" to a criminal prosecution under the CSA. Pet. App. 8a. The recognition of a medical necessity defense therefore would introduce illegitimate collateral issues into drug prosecutions under the Act and would consume unnecessary judicial resources by distracting the trier of fact from the core issues of guilt or innocence of a particular crime as defined by Congress in the CSA.

than two dozen organizations that are engaged in the distribution of marijuana to individuals who claim a need for the drug. See Jean Merl, *Marijuana Distribution Ban Alarms Patients*, Los Angeles Times, Aug. 31, 2000, at B1 (The Supreme Court's stay "order is unlikely to have much immediate effect on the other [24] cannabis clubs around the state."); Martin Kasindorf, *Medicinal Pot Use Set Back*, USA Today, Aug. 30, 2000, at 1A (The Court's stay "order sends a non-binding but chilling message to 35 other clubs currently supplying medicinal marijuana to 20,000 Californians.").[4] Thus, unless and until this Court grants review and reverses the Ninth Circuit's legal rulings, the government will be significantly hampered in enforcing the CSA against drug traffickers who are acting under the guise of "medical necessity." The Court therefore should grant certiorari now so that the matter can be put to rest this Term.

2. Respondents' defense of the court of appeals' decision is equally without merit.

a. Respondents argue (Br. in Opp. 17-29) that neither the CSA nor its history evinces a clear intent to abrogate a common law defense of medical necessity or to divest district courts of their equitable discretion to authorize the distribution of marijuana to those with asserted medical needs. Thus, respondents argue (*id.* at 26, 28) that, whereas Congress placed marijuana in Schedule I in order to restrict its distribution to the "general public," a medical necessity de-

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[4] See also, *e.g.* Holly J. Wolcott, *Marijuana Club Members Support Four Arrested Activists*, Los Angeles Times, Aug. 9, 2000, at B6 (discussing 800 members in Los Angeles Cannabis Resource Center); Ulysses Torassa, *City's Pot Clubs Live On*, San Francisco Examiner, June 13, 1999, at D1 (discussing more than 1000 members in ACT UP San Francisco dispensary; more than 300 members in Market Street Club; more than 600 members in Patients and Caregivers Health Center; and ongoing operations of Cannabis Helping Alleviate Medical Problems (CHAMP)).

fense serves the "different purpose[]" of permitting individuals to smoke marijuana when they and their physicians "jointly agree" that "generally accepted treatments are ineffective." Those assertions are fundamentally mistaken.

As we have explained (Pet. 8-16), the recognition of a medical necessity defense cannot be reconciled with the text and structure of the CSA, or with its overriding purpose to protect the public health and safety from the unauthorized distribution of controlled substances. The CSA regulates marijuana as a "drug." See 21 U.S.C. 802(6), 812. Absent the federal drug laws, there would be no prohibition under federal law against the distribution of marijuana for use by the general public, including by individuals who want to smoke marijuana for a claimed medical purpose. By listing marijuana as a Schedule I controlled substance, however, Congress has determined that marijuana has a "high potential for abuse," "no currently accepted medical use in treatment in the United States," and "a lack of accepted safety for use * * * under medical supervision." 21 U.S.C. 812(b)(1).[5]

Respondents attempt to avoid the plain import of those provisions by asserting (Br. in Opp. 6, 21, 25-29) that the terms "currently accepted medical use in treatment" and "medical necessity" convey different concepts, and that as

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[5] Respondents are wrong in contending (Br. in Opp. 18, 19) that Congress placed marijuana only "tentatively" in Schedule I because it knew that medical experts had not universally concluded that marijuana should be banned for all purposes. Absent rescheduling under the Act, Congress *definitively* has placed marijuana in Schedule I, where it has been listed for 30 years, knowing full well that it was banning the distribution of marijuana for any purpose, including asserted medicinal ones, except as authorized by the CSA. See 116 Cong. Rec. 1664 (1970) (statement of Sen. Hruska) (noting that marijuana was placed on Schedule I because it "comes squarely within the criteria of that schedule," *i.e.*, "highest abuse potential" and "little or no accepted medical use in this country").

long as the Ninth Circuit did not authorize respondents to distribute marijuana to the general public, the court was free to permit them to distribute marijuana to a more limited class of persons, *i.e.*, those who claim a medical need to smoke marijuana. But it is precisely because Congress has determined that marijuana has "*no* currently accepted medical use in treatment" (emphasis added) and placed marijuana in Schedule I that Congress has foreclosed a distributor from violating the CSA on the ground that the recipients claim a "medical necessity" for the drug.

In particular, respondents have not grasped the central point that the CSA imposes an absolute ban on the distribution of marijuana—*including* any distribution for asserted medical purposes—outside the strict confines of the Act itself. 21 U.S.C. 811-812, 823(f), 841(a)(1). Even for drugs listed in Schedules II through V, which Congress and the Attorney General have determined *do* have a "currently accepted medical use," 21 U.S.C. 812(b)(2)-(5), and for which the CSA *does* permit physicians to determine whether particular patients have a medical need, 21 U.S.C. 829, the CSA imposes strict controls on physicians and pharmacies before they may distribute the drug for medical use. See 21 U.S.C. 821-829; 21 C.F.R. Pts. 1301-1306. That comprehensive set of *statutory* controls leaves no room for the distribution of marijuana for medical purposes by relying on a *common law* defense of necessity.[6]

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[6] Respondents erroneously argue (Br. in Opp. 23-26) that, under the rule of lenity, Congress may not foreclose a common law defense of medical necessity without specifically mentioning that defense in the CSA. A necessity defense is unavailable when, as here, it fatally clashes with the text, structure, and purpose of the statute, whether or not Congress expressly has referred to the defense. *United States* v. *Bailey*, 444 U.S. 394, 415-416 & n.11 (1980) (declining to apply necessity defense in a manner that would render a congressional judgment "wholly nugatory"); see also Model Penal Code § 3.02(1)(c) (1962) (defense available only where

The Ninth Circuit's decision abandons even any pretext of compliance with those provisions and instead relegates to district courts and juries the power to determine whether illicit drugs can be distributed for an asserted medical use. The Ninth Circuit's recognition of a medical necessity defense also cannot be reconciled with Congress's unambiguous expression in the 1998 legislation, passed in specific response to efforts in some States to legalize the use of marijuana for medical purposes (see Pet. 11-12), of its continued adherence to the rule that the use of marijuana for asserted medical purposes not be permitted "without valid scientific evidence and the approval of the Food and Drug Administration." Act of Oct. 21, 1998, Pub. L. No. 105-277, Div. F, 112 Stat. 2681-2761.[7] And the Ninth Circuit's decision likewise cannot be squared with *United States* v. *Rutherford*, 442 U.S. 544 (1979), in which this Court unanimously rejected the assertion that the safety and effectiveness standards of the FDCA had no application to terminally ill cancer patients, reasoning that the FDCA "makes no special provision for drugs used to treat terminally ill patients," and that "[w]hen construing a statute so explicit in scope," it is incumbent upon the courts to give it effect. 442 U.S. at 551.

b. Respondents contend (Br. in Opp. 13-17) that, under this Court's decisions in *Weinberger* v. *Romero-Barcelo*, 456 U.S. 305 (1982), and *Hecht Co.* v. *Bowles*, 321 U.S. 321

"a legislative purpose to exclude the justification claimed does not otherwise plainly appear"); see also Pet. 8-9.

[7] Respondents argue (Br. in Opp. 20) that the 1998 Act "does not have the force of law." Respondents ignore the fact that the CSA (and the FDCA) *already* bar the distribution of marijuana. The 1998 Act expressly confirms those preexisting prohibitions specifically with respect to the use of marijuana for asserted medical purposes, and it therefore also refutes the notion that a court may allow the distribution of marijuana based on its own view of the "public interest." The authorities cited by respondent do not cast doubt on the significance of the 1998 Act in those respects.

(1944), district courts have the equitable discretion to decline to enjoin conduct that indisputably violates federal law. Neither decision, however, supports that proposition.

As we have explained (Pet. 17-18), district courts sitting in equity cannot "ignore the judgment of Congress" that is "deliberately expressed in legislation." *Virginian Ry.* v. *System Fed'n No. 40*, 300 U.S. 515, 551 (1937); see also *Miller* v. *French*, 120 S. Ct. 2246, 2253 (2000); *TVA* v. *Hill*, 437 U.S. 153, 194 (1978). The decisions in *Romero-Barcelo* and *Hecht Co.* strongly support our position that a court may not exercise its equitable discretion—which is intended to allow a court to decide how best to assure *compliance* with the Act—so as to countenance ongoing *violations* of the Act.

In *Romero-Barcelo*, the Court held that under the Federal Water Pollution Control Act, the district court retained discretion to order relief, other than an immediate injunction, that would "achieve compliance" with the statute. 456 U.S. at 307. The district court found that the Navy had committed "technical violations" of the statute, without "causing any 'appreciable harm' to the environment," by occasionally discharging ordnance into waters without a permit. *Id.* at 310. The Supreme Court found that "although the District Court declined to enjoin the discharges, it neither ignored the statutory violation nor undercut the purpose and function of the permit system." *Id.* at 315. The Court further observed that, "[r]ather than requiring a district court to issue an injunction for any and all statutory violations, the FWPCA permits the district court to order that relief it considers necessary *to secure prompt compliance with the Act.*" *Id.* at 320 (emphasis added).

Similarly, in *Hecht Co.*, the district court declined the government's request for an injunction against a defendant that had violated statutory price controls. The district court reasoned that it had "no doubt" that the defendant acted in "good faith and diligence" in attempting to comply with statute, that it had taken "vigorous steps" to correct and

prevent recurrence of its mistakes, and that issuance of an injunction would have "no effect" on ensuring future compliance. 321 U.S. at 325, 326. This Court concluded that under the statute "there is some room for the exercise of discretion on the part of the court," and that other remedial orders short of an injunction might have been consistent with the statute. *Id.* at 328. The Court made clear, however, that courts had the responsibility to enforce the statute and that "their discretion under [the statute] must be exercised in light of the large objectives of the Act." *Id.* at 331.

Those decisions stand in stark contrast to the Ninth Circuit's ruling here, which allows the ongoing distribution of marijuana in open violation of the CSA. Congress itself has weighed what it deemed to be the relevant public-interest considerations and made the fundamental policy choice that "the illegal * * * distribution[] and * * * improper use of controlled substances have a substantial and detrimental effect on the health and general welfare of the American people," 21 U.S.C. 801(2), and therefore that marijuana, a Schedule I controlled substance, may not be distributed for any purpose, "[e]xcept as authorized" by the Act, 21 U.S.C. 841(a)(1). Accordingly, the Ninth Circuit's extraordinary holding that a court may allow the distribution of marijuana notwithstanding the CSA is clearly contrary to the Act and warrants this Court's review.

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For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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NOVEMBER 2000